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Self-Incrimination, Court of Appeals People v. Siegel

SELF-INCRIMINATION

N.Y. CONST. art. I, § 6:

No person shall . . . be compelled in any criminal case to be a witness against himself.

U.S. CONST. amend. V:

No person shall . . . be compelled in any criminal case to be a witness against himself.

COURT OF APPEALS

People v. Siegel[1]
(decided December 27, 1995)

The defendant, Shannon Siegel, was convicted of first and second degree assault, conspiracy in the fourth degree, riot in the second degree and possession of a weapon in the fourth degree.[2] The Appellate Division, Second Department, affirmed the lower court's decision of conviction.[3] The defendant appealed, claiming that the trial court erred in allowing the court to warn and advise defense witness, Gourdin Heller, regarding his Fifth Amendment privilege[4] and by allowing the jury to consider Heller's assertion of the privilege in weighing his credibility.[5]

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1. 87 N.Y.2d 536, 663 N.E.2d 872, 640 N.Y.S.2d 831 (1995).
2. *Id.* at 541, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
3. 207 A.D.2d 919, 616 N.Y.S.982 (2d Dep't 1994).
4. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." *Id.* N.Y. CONST. art. I, § 6. This section provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." *Id.*
5. *Siegel*, 87 N.Y.2d at 542-43, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.

The New York State Court of Appeals affirmed the appellate division's decision, and held that the trial court's conclusion was correct.[6] The court reasoned that when Heller indicated his intention to continue asserting his privilege to remain silent as to all further questions, and was then excused from the witness stand, the prosecution was deprived of their right to cross-examine to find out the truth of the statements given on direct examination.[7]

In *Siegel*, the defendant attended a party with his friend, Gourdin Heller, and four other young men.[8] The defendant, a white male, was accused of using a racial epithet in describing his ex-girlfriend's date, Jermaine Ewell, an African-American, while at the party.[9] After a confrontaion between the defendant and Ewell, the defendant left the party with Heller and two young women.[10] A large group of Ewell's friends chased them.[11] After speaking with Heller, the defendant and the two young women drove away, while Heller stayed behind.[12] The other men that went to the party with the defendant left in another car for defendant's house.[13] After discussing what should be done in response to the incident at the party, they collected stickball bats and drove back to the boardwalk near the party.[14]

When they returned, many of the people who were at the party, including Ewell, had gathered on the boardwalk.[15] While on the boardwalk, Ewell was repeatedly beaten and eventually was taken to the hospital.[16] Ewell survived the beating, but he was severly injured.[17]

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6. *Id.* at 542, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
7. *Id.* at 543, 663 N.E.2d at 875, 640 N.Y.S.2d at 833.
8. *Id.* at 539-40, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
9. *Id.* at 540, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

The defendant, Siegel, was charged, along with four co-defendants, with various offenses in connection with the attack.[18] On appeal, Siegel argued that the trial court made four errors in its handling of Heller's testimony.[19]

On direct examination, Heller corroborated the defendant's position that he did not return to the boardwalk for the purpose of causing bodily harm to anyone, but that he returned to find, or possibly assist, Heller.[20] Heller's testimony also indicated that Ewell initiated the confrontation at the party.[21]

On cross-examination, however, Heller's credibility was put into issue based on elicited testimony from Heller which showed a discrepancy between his trial testimony and his prior grand jury testimony, as to whether the attack was racially motivated.[22] The court explained to Heller the potential legal consequences of perjury and asked if he would like a lawyer.[23] After obtaining a lawyer, the court was informed that Heller would be invoking his Fifth Amendment privilege against self-incrimination, yet the court ruled that Heller would nevertheless be questioned in front of the jury.[24] After asserting his Fifth Amendment privilege many times, the court instructed the jury that they were allowed to consider the invocation of the Fifth Amendment privilege on the issue of witness credibility.[25]

The defendant argued that four errors were committed by the trial court with regard to Heller's testimony: (1) warning Heller of the consequences of inconsistent testimony intimidated Heller into invoking the Fifth Amendment privilege, (2) requiring Heller to invoke the privilege in the jury's presence, (3) instructing the jury to consider the refusal to answer on the credibility issue and (4) permitting the prosecution to comment

18. *Id.*
19. *Id.* at 541, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 541-42, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
24. *Id.* at 542, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
25. *Id.*

on Heller's refusal to testify during closing arguments.[26] The court of appeals found no part of the trial court's treatment of Heller's testimony to be error.[27]

The court began its analysis by looking to the New York Court of Appeals cases, *People v. Lee*[28] and *People v. Shapiro*.[29] In both cases, a warning to use the Fifth Amendment privilege was held not to violative any rights.[30] In *Lee*, the trial judge warned the defendant that he had the right to remain silent and plead the privilege against self-incrimination, that he should get an attorney and, if he did testify, "his testimony would be referred very strongly to the District Attorney for appropriate action."[31] The court held that the warning was given simply to advise the witness of possible consequences of perjury, and was not in violation of the constitution.[32] Similarly, the court held in *Shapiro* that, not only was a warning to potential witnesses of their possible liability for false statements under oath allowed, it was an obligation.[33]

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26. *Id.*

27. *Id.*

28. 58 N.Y.2d 773, 445 N.E.2d 195, 459 N.Y.S.2d 19 (1982).

29. 50 N.Y.2d 747, 409 N.E.2d 897, 431 N.Y.S.2d 422 (1980).

30. *Lee*, 58 N.Y.2d at 775, 445 N.E.2d at 196, 459 N.Y.S.2d at 20 (holding that there is, in fact, an obligation to warn a witness, but not in such intimidating terms so as to interfere with his choice of whether to testify); *Shapiro*, 50 N.Y.2d at 761-62, 409 N.E.2d at 905, 431 N.Y.S.2d at 430 (holding that an attorney has an obligation to warn potential witnesses of their possible liability so long as these warnings are not so emphatic as to become intimidating).

31. *Lee*, 58 N.Y.2d at 775, 445 N.E.2d at 195, 459 N.Y.S.2d at 19.

32. *Id.* (finding that it would have been better if the words "very strongly" had not been used, even though the warning was still not considered an error). *Id.*

33. *Shapiro*, 50 N.Y.2d at 761, 409 N.E.2d at 905, 431 N.Y.S.2d at 430. In *Shapiro*, the defendant was convicted of promoting prostitution and endangering the welfare of a minor. *Id.* at 752, 409 N.E.2d at 905, 431 N.Y.S.2d at 430. On appeal, the defendant contended that his due process rights were violated when the district attorney "openly, repeatedly and unqualifiedly" advised three prospective defense witnesses that they could use their privilege against self-incrimination. *Id.* The court held that this advice, although generally obligatory, must not be emphasized to the point where it

The United States Court of Appeals also allows the court to issue warnings about the possibility of self-incrimination. In *United States v. Arthur*,[34] the district court continuously warned the witness about asserting the Fifth Amendment privilege.[35] While acknowledging that warning a witness about self-incrimination is in the court's discretion, the *Arthur* court held that an abuse of that discretion occurred when the court repeatedly badgered a witness into not testifying.[36] In *Siegel*, the court found that no abuse of discretion occurred, and that the warning given did not exceed prescribed limits.[37] The court merely warned of the consequences of giving inconsistent testimony and advised the defendant that he could consult with an attorney.[38]

In deciding whether Heller's refusal to answer questions on Fifth Amendment grounds could be considered by the jury, the court looked to the New York Court of Appeals case, *People v. Chin*,[39] and the leading federal case, *United States v. Cardillo*.[40] In *Chin*, the prosecution was deprived of the right to cross examine the witness due to the assertion of the Fifth Amendment.[41] Thus the prosecution was entitled to have the direct testimony stricken entirely and the jury was instructed to disregard it.[42] However, the *Cardillo* court posed three levels of

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becomes an instrument of intimidation. *Id.* at 761-62, 409 N.E.2d at 905, 431 N.Y.S.2d at 430.

34. 949 F.2d 211 (6th Cir. 1991); *See also* United States v. Silverstein, 732 F.2d 1338 (7th Cir.1984), *cert. denied*, 469 U.S. 1111 (1985).

35. *Arthur*, 949 F.2d at 215.

36. *Id. See also* Webb v. Texas, 409 U.S. 95 (1972) (holding that a defense witness may not be singled out before giving testimony and threatened by the court of damages if perjured testimony is given).

37. *Siegel*, 87 N.Y.2d at 543-44, 663 N.E.2d at 875, 640 N.Y.S.2d at 834. In *Siegel*, the prosecution was entitled to have the witness' testimony stricken in its entirety, but instead left the testimony in favor of the defendant on the record as evidence for the court to consider.

38. *Id.* at 543, 663 N.E.2d at 875, 640 N.Y.S.2d at 834.

39. 67 N.Y.2d 22, 490 N.E.2d 505, 499 N.Y.S.2d 638 (1986).

40. 316 F.2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

41. *Id.*

42. *Chin*, 67 N.Y.2d at 28, 490 N.E.2d at 510, 499 N.Y.S.2d at 643.

remedial action: (1) striking the entire testimony, (2) striking part of the testimony or (3) not striking the testimony at all, but merely charging the jury as to how much weight to afford the testimony.[43]

The *Cardillo* court stated that the choice of which method of action to take, is based upon how closely related the questions posed were to the ultimate issue.[44] Since the questions posed to Heller were so directly related to the commission of the crime, the trial court would have been justified in striking all of Heller's direct testimony. However, the court in *Siegel* took a less drastic approach by leaving the statements already testified to on the record for consideration and by excusing the witness from the stand.[45]

With regard to the issue of whether the jury should have been instructed to consider Heller's refusal to testify when assessing credibility, the court answered in the affirmative.[46] Because Heller's direct testimony was never subjected to cross-examination, it was permissible for the jury to consider his Fifth Amendment invocation in weighing his credibility.[47] This holding is consistent with the United States Supreme Court case of *Delaware v. Fensterer*.[48]

In sum, the New York Court of Appeals found no errors in the trial court's treatment of Heller's invocation of the Fifth Amendment and affirmed its decision. Both Federal and the New York law, as evidenced by cases in both jurisdictions, are in accord in holding that it is proper to warn a witness of the consequences of giving inconsistent sworn testimony and to

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43. *Cardillo*, 316 F.2d at 611.

44. *Id.*

45. *Siegel*, 87 N.Y.2d at 545, 663 N.E.2d at 876, 640 N.Y.S.2d at 835.

46. *Id.*

47. *Id.*

48. 474 U.S. 15 (1985). In *Fensterer*, the prosecution expert could not remember the theory on which he based his opinion. *Id.* at 17. The defendant was convicted of murder and then appealed. *Id.* at 16-17. The Supreme Court stated that the Confrontation Clause is satisfied when the defense is given a fair opportunity to cross-examine, and possibly present reasons why the witness' testimony should be given little weight. *Id.* at 21.

advise the witness to consult with an attorney. The jurisdictions are also consistent in deciding that it is proper to instruct a jury that a defense witness' refusal to answer questions on self-incrimination grounds during cross-examination may be considered in weighing the witness' credibility.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Hendricks[49]

(decided August 19, 1996)

Defendant, John Hendricks, appealed his conviction of attempted rape and claimed that the trial court erred when it permitted the prosecution to introduce police testimony concerning an oral statement that the defendant allegedly made to the police because it violated his fundamental and basic constitutional right to remain silent.[50] The Appellate Division, Second Department, affirmed the decision of the trial court and held that, since the defendant never invoked his right to remain silent, the admission of Detective Kenneth Diehm's testimony did not constitute an improper reference to defendant's exercise of his privilege against self-incrimination.[51]

At trial, the prosecution presented the testimony of Detective Diehm who interviewed the defendant after his arrest on charges

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49. 222 A.D.2d 74, 646 N.Y.S.2d 845 (2d Dep't 1996).

50. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself." N.Y. CONST. art. I, § 6. Article I provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself."

51. *Hendricks*, 222 A.D.2d at 81, 646 N.Y.S.2d at 849.